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ALEXANDER L. STEVAS
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No. 80-1643

IN THE

Supreme Court of the United States

October Term, 1980

SILVER BULK SHIPPING, LTD.,

Petitioner,

v.

WILLIAM McCARTHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a shipowner *admitted negligence* in the maintenance of the hatch covers of the No. 1 hold of its vessel, as a result of which water leaked into the hold, mixed with some of the cargo of bulk sugar contained therein, and subsequently froze, creating a condition where some of the cargo of sugar was frozen to the ribs of the vessel, (a) did not the District Court correctly rule that the sole issue with respect to the shipowner's liability was one of proximate cause between the shipowner's *admitted negligence* and the happening of the accident, and (b) did not the District Court correctly rule that any alleged "negligence" by the stevedore would not relieve the shipowner from liability for its own *admitted negligence*?

2. Where a shipowner was permitted to, and did in fact, offer evidence as to alternative methods that might have been employed by a stevedore in discharging a cargo of sugar where portions of the sugar had become frozen to the ribs of the ship, such evidence being relevant to the issues of "foreseeability" and "proximate cause" between the shipowner's admitted negligence and the happening of the accident, did not the District Court correctly rule that evidence of "breach of duty" by the stevedore was irrelevant because any negligence of the stevedore, even if established, would not relieve the shipowner from liability for its own negligence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES	iii
BRIEF FOR RESPONDENT IN OPPOSITION	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	4
I. Since the Shipowner Conceded Its Negligence in the Maintenance of the Hatch Covers, Neither the Decisions Below Nor the Record Present a Question With Respect to the Duty Which a Vessel Owner Owes Toward a Longshoreman Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act	4
II. Since the Jury Found That the Condition of the Frozen Sugar Which Caused Respondent's Injury Was a Condition Which Could Not Have Been Remedied by a Reasonable Stevedore, Neither the Decisions Below Nor the Record Present an Issue of Possible Application of a Rule of Law Which Is Conflict With Land-Based Principles of Tort Liability	6
III. The Ruling by the District Court, Affirmed by the Third Circuit, That the Negligence of the Stevedore Was Irrelevant in a Longshoreman's Suit Against a Shipowner Was Correct and Directly Mandated by This Court's Decision in Edmonds v. Compagnie Transatlantique, 443 U. S. 256 (1979)	7
CONCLUSION	10

TABLE OF CASES

Page

De Los Santos v. Scindia Steam Navigation Co., 598 F. 2d 480 (9th Cir. 1979), cert. granted, 100 S. Ct. 2150 (1980) (No. 79-512) 4, 5, 6

Edmonds v. Compagnie Generale Transatlantique, 443 U. S. 256 (1979) 6, 7, 8

Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F. 2d 116 (3rd Cir. 1979), cert. pending, 444 U. S. 1042 (1980) .. 3, 6, 7

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent, William McCarthy, respectfully prays that petitioner's application for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered on December 12, 1980, be denied.

The Opinion of the Court Below, the Jurisdictional Requisites and the Statues Involved are correctly and adequately set forth in the Petition.

STATEMENT OF THE CASE

Respondent concurs in the Statement of the Case as set forth in the Petition except in the following significant respects.

At page 4 of the Petition, petitioner asserts that the procedure utilized to discharge the cargo of sugar from the vessel was established by plaintiff's employer, Amstar. This is not correct. Rather, the procedure used to discharge the sugar using a clamshell bucket, bulldozers and trimmers is well established in the bulk sugar carriage industry, and the sugar was loaded aboard the vessel with the knowledge that it would be discharged by this procedure. Amstar simply was following general industry practices with respect to discharging the sugar.

At page 7 of the Petition, petitioner states that the Amstar longshoremen were paid "distress rates" because of the frozen condition of the sugar. This is not so. They were paid the distress rates because of the "wet" condition of the sugar, which made it syrupy and created a "noxious" condition in which to work. The distress rates had nothing at all to do with the frozen condition of the sugar that subsequently resulted in respondent's injury.

At the bottom of page 8 and the top of page 9 of the Petition, the statement is made that respondent was struck by a large piece of "caked" sugar that fell from an area which had been accessible to him during the first or second cycle but which had not been removed. This is not a correct statement of the testimony. Rather, the sugar which fell and hit respondent was "frozen", not "caked", see 487 F. Supp. at 1023, App. 3a, and while it had been accessible to him during the first or second cycle, the testimony was that it could not be removed at that time because it was frozen solid.

Finally, it should be noted that the District Court determined to submit the case on special, purely factual

interrogatories, only after the shipowner had conceded that it had been negligent in the maintenance of the hatch covers.[1] For this reason, it neither can nor should be presumed that the Third Circuit, in affirming the decision of the District Court, was relying on the definition of a vessel owner's duty of care as adopted in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (3d Cir. 1979), *cert. pending*, 444 U. S. 1042 (1980). In *Griffith* the issue determined was the definition of the applicable standard of care. In the instant case, the definition of the applicable standard of care was not in issue as the shipowner had conceded its negligence; the issue in the instant case was solely one of proximate cause.

1. The interrogatories are set forth in the text *infra* at page 5.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Since the Shipowner Conceded Its Negligence in the Maintenance of the Hatch Covers, Neither the Decisions Below Nor the Record Present a Question With Respect to the Duty Which a Vessel Owner Owes Toward a Longshoreman Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner first argues that the Writ should be granted because the instant case presents the same issue as is presently pending before the Court in *De Los Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979), *cert. granted*, 100 S. Ct. 2150 (1980) (No. 79-512). This is not so. The issues are substantially different.

In *De Los Santos* the issue pending before the Court is the question of what is the proper definition of the standard of care which a shipowner owes to a longshoreman in order to determine whether the shipowner's conduct was "negligent." In the instant case, negligence was not at issue, as the shipowner *conceded* that it had been negligent in the maintenance of the hatch covers, and that the water leaked into the hatch by reason of this negligently created condition.

As the District Court noted, there was undisputed evidence that sea water had leaked into the No. 1 hold through the hatch covers, that heavy rust on the raised lip of the hatch coaming had prevented the hatch covers from providing a watertight seal, and that the nature of rust was such that it would have taken years to build up to the point where it prevented a tight seal. Finally, there was evidence that the vessel's crew was responsible for maintaining the hatch covers. Faced with this testimony, the defendant conceded that it had been negligent in failing to maintain the hatch covers in a reasonably safe condition, see 487 F. Supp. at 1025-1026, App. 13a.

Since the shipowner had conceded its negligence in the faulty maintenance of the hatch covers, no issue was presented as to the definition of the applicable standard of care such as is presently before the Court in *De Los Santos.* Instead, the Court correctly conceived the case as presenting only an issue of proximate cause and, therefore, submitted the case to the jury through factual interrogatories, on the basis of the answers to which it molded a verdict in favor of the respondent.

Interrogatory No. 1 stated as follows:

> "Did the leakage of seawater into the hold alone or in combination with the freezing temperature bring about a condition which was a substantial factor in causing the accident?" (487 F. Supp. at 1028, f.n. 19, App. 25a, f.n. 19.)

The jury answered this first Interrogatory, "Yes", which constituted a finding of proximate cause between the shipowner's negligence in the faulty maintenance of the hatch covers and the injuries suffered by respondent.

The District Court then submitted a second factual Interrogatory as follows:

> "If your Answer to No. 1 is YES, was this a condition which could have been remedied by a reasonable stevedore?" (487 F. Supp. at 1028, App. 25a).

The jury answered the second Interrogatory, "No."

On the basis of the jury's answers to the foregoing Interrogatories, and the undisputed evidence of negligence with respect to the maintenance of the hatch covers, the instant case must be viewed as presenting a factual picture in which a shipowner, having the duty to maintain the vessel's hatch covers (the shipowner did not deny that it had such a duty), was admittedly negligent in the

performance of that duty with the result that a condition was created which could not be remedied by the stevedore and which ultimately resulted in the injury to the respondent-longshoreman. No case from any Circuit, under any theory of law yet to be advanced, has held that a shipowner should not be held liable under such factual circumstances. Certainly, the *De Los Santos* case does not present such an issue, and there is no reason to grant the instant Writ merely to await this Court's decision in *De Los Santos.*

II. Since the Jury Found That the Condition of the Frozen Sugar Which Caused Respondent's Injury Was a Condition Which Could Not Have Been Remedied by a Reasonable Stevedore, Neither the Decisions Below Nor the Record Present an Issue of Possible Application of a Rule of Law Which is in Conflict With Land-Based Principles of Tort Liability.

In Point II of its Petition, the shipowner argues that it should be relieved from liability because Amstar, the respondent's employer, was aware of the condition of the frozen sugar and was in a position to correct the condition. While the Third Circuit has rejected the contention that negligence of a stevedore would operate to relieve a shipowner from liability for conditions resulting from its own negligence, see *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (3d Cir. 1979), *cert. pending*, 444 U. S. 1042 (1980), relying on this Court's decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S. 256 (1979), that issue is not presented by the instant record or by the decisions below, for, as previously noted, the jury specifically found that the condition of the frozen sugar was *not* one which could have been remedied by a reasonable stevedore. The instant record does not present any issue of conflict with land-based principles of tort law

based on the ability of the stevedore to correct the dangerous condition created by the shipowner for the simple reason that the jury found the facts to be otherwise.

III. The Ruling by the District Court, Affirmed by the Third Circuit, That the Negligence of the Stevedore Was Irrelevant in a Longshoreman's Suit Against a Shipowner Was Correct and Directly Mandated by This Court's Decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S. 256 (1979).

At the trial, petitioner sought to introduce evidence as to the standard of care required by a stevedore. The District Court declined to permit such evidence on the grounds that the negligence of the stevedore would not relieve the shipowner from liability for its own negligence. Thus, the Court stated, 487 F. Supp. 1030-1031, App. 33a-37a:

> "1. Stevedore's Negligence
>
> "Negligence on the part of the stevedore does not necessarily relieve a negligent owner of liability. *Griffith II*, supra, 610 F. 2d at 125. In this case negligence of the owner was not in dispute; the issue for the jury was causation: was the negligence of the owner the proximate cause of plaintiff's injuries. *In this regard proof of the stevedore's negligence was irrelevant.* Defendant asserts that its defense, for factual consideration by the jury, was that the negligence of the stevedore was the sole proximate cause of the accident. Shipowner's Brief at 14. Defendant needed to show that the stevedore's acts or omissions, negligent *vel non*, were the sole proximate cause of plaintiff's injuries. To this end the record shows full description and explanation of the stevedore's actions; in addition, defendant was permitted to cross-examine

plaintiff and plaintiff's witnesses and to introduce evidence on its own about alternate methods of discharging a cargo of sugar. T 1-69 through 71, 1-81 through 90, 1-104 through 106, 1-122 through 124, 2-30 through 31, 2-75 through 78, 2-89 through 91.

"Defendant asserts that by submitting Interrogatory No. 2 to the jury, the stevedore's negligence was placed in issue even though defendant had not been permitted to introduce evidence as to that negligence. Interrogatory No. 2, as discussed above, went to the issue of the vessel owner's duty and whether that duty had shifted to a third party. *In order to answer the interrogatory, the jury did not need to consider evidence of the stevedore's negligence. Even the conceded negligence of the stevedore would not necessarily bar recovery from the owner.* Thus the ruling keeping out evidence of the stevedore's negligence and submission to the jury of Interrogatory No. 2 are not contradictory." (Emphasis in original)

The contention that the negligence of the stevedore might operate to relieve a shipowner from liability for its own negligence was clearly and unequivocally rejected by this Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S. 256, 268-269 (1979), as follows:

"As we have said, § 905 permits the injured longshoreman to sue the vessel and exempts the employer from any liability to the vessel for any damage that may be recovered. *Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act.* Fur-

thermore, under the traditional rule, the employee may recover from the ship the entire amount of the damages so determined. If he recovers less than the statutory benefits, his employer is still liable for the statutory amount.

> "Under this arrangement, *it is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury.* The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act and if it has lien rights on the longshoreman's recovery it may be out of pocket even less." (Emphasis in original)

Since negligence on the part of the stevedore would not operate to relieve a shipowner from liability where its own negligence has been established, evidence as to the standard of care imposed on a stevedore is irrelevant. As the District Court correctly held, the issues to be determined were was the shipowner negligent and was such negligence a proximate cause of the longshoreman's injuries. Whether or not the stevedore may also have been negligent neither adds nor subtracts from the shipowner's liability for its own negligence. Accordingly, evidence of stevedore negligence was irrelevant.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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